IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

ROGER STOKELY,	**1: 01 CV 6030 LJO WMW HC**
Petitioner,	**FINDINGS AND RECOMMENDATIONS RE PETITION FOR WRIT OF HABEAS CORPUS**
v.	
JOE McGRATH, Warden,	
Respondent.	

Petitioner is a state prisoner proceeding with counsel on a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254.

PROCEDURAL HISTORY

On November 8, 1995, Petitioner pled guilty to engaging in three or more substantial sexual assault. The trial court sentenced Petitioner to six years in state prison.

On June 6, 1996, Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, Fifth Appellate District ("Court of Appeal"). On July 3, 1996, the Court of Appeal denied the petition.

On July 17, 2000, Petitioner filed a petition for writ of habeas corpus in the Stanislaus County Superior Court. On July 18, 2000, the Superior Court denied the petition.

On September 5, 2000, Petitioner filed another petition for writ of habeas corpus in the Court of Appeal. The Court of Appeal denied the petition on September 25, 2000.

On October 23, 2000, Petitioner filed a petition for writ of habeas corpus with the California Supreme Court. The court denied the petition as untimely on March 28, 2001. On February 19, 2002, Petitioner filed another petition for writ of habeas corpus in the California Supreme Court. The court denied the petition on June 12, 2002.

Petitioner filed the present petition for writ of habeas corpus on July 24, 2001. On June 26, 2002, Respondent filed a motion to dismiss the petition on the ground that it was barred by the applicable one-year statute of limitations set forth in the Anti-Terrorism and Effective Death Penalty Act of 1996. Petitioner opposed the motion. On October 3, 2002, the Magistrate Judge recommended that Respondent's motion to dismiss be granted and that the petition be dismissed. The Magistrate Judge found that the statute of limitations ran on May 22, 1997, and that Petitioner was not entitled to tolling during the four-year gap between his first and second state collateral actions, which was the time period between July 3, 1996, and July 17, 2000. The Magistrate Judge also determined Petitioner was not entitled to equitable tolling because he simply alleged the delay was due to medical reasons without showing that any mental problems rendered him unable to file a timely habeas petition. The court noted that Petitioner did not "describe his condition, nor does he provide the dates during which he was affected by his condition."

On October 28, 2002, Petitioner filed objections to the Magistrate Judge's findings and recommendation. Attached to the objections was a psychological report dated September 16, 1996. After a de novo review of the case, the District Judge adopted the findings and recommendations and granted Respondent's motion to dismiss on December 16, 2002.

Petitioner appealed to the Ninth Circuit. On September 10, 2004, the parties made a joint motion for summary reversal of the District Judge's order dismissing the petition. The government stipulated to a remand of the case based on the decision in Laws v. LaMarque, 351 F.3d 919 (9th Cir. 2003), which was decided after the District Court entered judgment in this case. Pursuant to the parties' joint motion, the Ninth Circuit reversed and remanded the case. The case was remanded "for further factual development and, if appropriate, an evidentiary hearing on whether appellant is entitled to equitable tolling."

Counsel was appointed on remand. On December 8, 2004, this court ordered supplemental briefing addressing the issue of whether a need existed for an evidentiary hearing on whether Petitioner was entitled to equitable tolling. After being granted two extensions of time, Petitioner filed his supplemental memorandum on August 1, 2005. Respondent filed his response to Petitioner's supplemental memorandum on September 29, 2005, to which Petitioner filed a reply on October 7, 2005.

On February 8, 2006, the Magistrate Judge entered an order, first summarizing the parties' arguments and then finding in part as follows:

> In his reply to Respondent's supplemental brief, Petitioner argues that in light of the evidence of the 1996 psychological report and the mental health records in the Central File, Petitioner "should not be barred . . . from a Status Conference to determine whether further factual development (subpoenaing of other records, appointment of psychiatrists, etc.) is necessary, or, if appropriate, evidentiary hearing."
>
> The court finds that in requesting a status conference to determine whether additional factual development is necessary and whether an evidentiary hearing should be held, Petitioner ignores the directive of this court in regard to the purpose of the supplemental briefing. The parties were ordered to submit briefs " addressing the issue of whether a need exists for an evidentiary hearing on whether Petitioner is entitled to equitable tolling." No mention of a subsequent status conference was made by the court. Thus, any arguments that Petitioner has in support of a need for an evidentiary hearing were to be made in his supplemental brief, not later. The purpose of an evidentiary hearing is to resolve the merits of a factual dispute. Petitioner presents no arguments in his supplemental brief regarding what information could be gleaned regarding his alleged mental incompetence through an evidentiary hearing. He simply asks for a status conference to determine whether further factual development and an evidentiary hearing are necessary.
>
> The court has already given Petitioner an opportunity, through the supplemental briefing, to demonstrate why an evidentiary hearing is needed in this case. Petitioner has not done so. It is the role of Petitioner's counsel, not the court,

> to propose specific factual development to support his claim. Accordingly, the court finds no basis for an evidentiary hearing, and will not order one.
>
> Petitioner expressly submits his arguments regarding the 1996 psychological report and Petitioner's Central File and "further factual development" in this case. He does not, however, explain what other factual development he would like to pursue or how it is necessary to the court's understanding of this case. The court finds that the parties have essentially agreed that under Laws v. LaMarque, Petitioner has made the initial showing regarding an impediment under § 2254(d)(1)(B) such that further factual development was required. Petitioner has now had the opportunity to develop the facts and has done so by lodging a series of documents with the court from his Central File. Petitioner, however, presents no specific arguments regarding the contents of these documents. The burden of demonstrating that extraordinary circumstances exist such as would justify equitable tolling lies with the petitioner. Marolf, 173 F.3d at 1218 n. 3. While the court's prior order directed the parties to address the issue of an evidentiary hearing, it did not direct the parties to address the merits of Petitioner's claim regarding equitable tolling. It appears that Petitioner's counsel may not yet have fully presented the court with his arguments regarding the claim. Therefore, out of an abundance of caution, the court will give the parties a final opportunity to address the issue of equitable tolling.

Petitioner filed his supplemental brief on May 9, 2006, and Respondent filed his response on June 8, 2006. In his response, Respondent asked the court to resolve the petition on the merits, without deciding the equitable tolling issue. Respondent did not concede that Petitioner was entitled to equitable tolling and specifically reserved the right to litigate this issue, if necessary, at a later time. Rather, Respondent opined that rather than litigate the complex issue of Petitioner's competency, it would be more expeditious to simply resolve the petition on the merits. Petitioner did not respond to that request. Accordingly, on February 6, 2007, the court entered an order stating in part that "[i]n order to properly determine whether this court may address the merits of the present petition without addressing the equitable tolling issue, this court must examine Respondent's response to the merits of the petition." The court ordered Respondent to file an answer to the petition and granted Petitioner the opportunity to file a traverse. Respondent filed his response on March 22, 2007, and Petitioner filed his traverse on April 20, 2007.

LEGAL STANDARD

JURISDICTION

Relief by way of a petition for writ of habeas corpus extends to a person in custody

pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 120 S.Ct. 1495, 1504 fn.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States Constitution. In addition, the conviction challenged arises out of the Stanislaus County Superior Court, which is located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 2241(d). Accordingly, the court has jurisdiction over the action.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied,* 522 U.S. 1008, 118 S.Ct. 586 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied,* 520 U.S. 1107, 117 S.Ct. 1114 (1997), *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed on July 24, 2001, after the enactment of the AEDPA, thus it is governed by its provisions.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The AEDPA altered the standard of review that a federal habeas court must apply with respect to a state prisoner's claim that was adjudicated on the merits in state court. Williams v. Taylor, 120 S.Ct. 1495, 1518-23 (2000). Under the AEDPA, an application for habeas corpus will not be granted unless the adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or "resulted in a decision

that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d); Lockyer v. Andrade, 123 S.Ct. 1166, 1173 (2003) (disapproving of the Ninth Circuit's approach in Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000)); Williams v. Taylor, 120 S.Ct. 1495, 1523 (2000). "A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Lockyer, at 1174 (citations omitted). "Rather, that application must be objectively unreasonable." Id. (citations omitted).

While habeas corpus relief is an important instrument to assure that individuals are constitutionally protected, Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392 (1983); Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal conviction is the primary method for a petitioner to challenge that conviction. Brecht v. Abrahamson, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court's factual determinations must be presumed correct, and the federal court must accept all factual findings made by the state court unless the petitioner can rebut "the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995); Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457 (1995); Langford v. Day, 110 F.3d 1380, 1388 (9th Cir. 1997).

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

A petitioner can satisfy the exhaustion requirement by providing the highest state

court with a full and fair opportunity to consider each claim before presenting it to the federal court. Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). In the present case, Respondent admits that Petitioner exhausted his claims for relief.

When the California Supreme Court's opinion is summary in nature, this Court "looks through" that decision and presumes it adopted the reasoning of the last state court to have issued a reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 804-05 & n. 3, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (establishing, on habeas review, "look through" presumption that higher court agrees with lower court's reasoning where former affirms latter without discussion); see also LaJoie v. Thompson, 217 F.3d 663, 669 n. 7 (9th Cir.2000) (holding federal courts look to last reasoned state court opinion in determining whether state court's rejection of petitioner's claims was contrary to or an unreasonable application of federal law under § 2254(d)(1)).

DISCUSSION

Ineffective Assistance of Counsel

Petitioner contends that his counsel was ineffective in advising him to accept the plea bargain offered by the district attorney, on the ground that the District Attorney could use Petitioner's prior "strike" to seek a doubled sentence. Petitioner claims that counsel was mistaken, and that his prior strike could not have been so used, because the alleged crime occurred prior to the enactment of the Three Strikes Law on March 7, 1994. The Stanislaus County Superior Court rejected Petitioner's claim, finding that the Three Strikes law went into effect prior to the time of the alleged offense

The law governing ineffective assistance of counsel claims is clearly established for the purposes of the AEDPA deference standard set forth in 28 U.S.C. § 2254(d). Canales v. Roe, 151 F.3d 1226, 1229 (9th Cir. 1998.) In a petition for writ of habeas corpus alleging ineffective assistance of counsel, the court must consider two factors. Strickland v.

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). First, the petitioner must show that counsel's performance was deficient, requiring a showing that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. The petitioner must show that counsel's representation fell below an objective standard of reasonableness, and must identify counsel's alleged acts or omissions that were not the result of reasonable professional judgment considering the circumstances. Id. at 688; United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995). Judicial scrutiny of counsel's performance is highly deferential. A court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994).

Second, the petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result ... would have been different," 466 U.S., at 694. Petitioner must show that counsel's errors were so egregious as to deprive defendant of a fair trial, one whose result is reliable. Strickland, 466 U.S. at 688. The court must evaluate whether the entire trial was fundamentally unfair or unreliable because of counsel's ineffectiveness. Id.; Quintero-Barraza, 78 F.3d at 1345; United States v. Palomba, 31 F.3d 1356, 1461 (9th Cir. 1994).

This two-part standard also applies to challenges to guilty pleas based in ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that (1) his counsel failed to provide reasonable competent advice, and that (2) there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366 (1985).

A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the petitioner as a result of the alleged deficiencies.

Strickland, 466 U.S. 668, 697, 104 S.Ct. 2052, 2074 (1984). Since the defendant must affirmatively prove prejudice, any deficiency that does not result in prejudice must necessarily fail. However, there are certain instances which are legally presumed to result in prejudice, e.g., where there has been an actual or constructive denial of the assistance of counsel or where the State has interfered with counsel's assistance. See Strickland, 466 U.S. at 692; United States v. Cronic, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25 (1984).

Ineffective assistance of counsel claims are analyzed under the "unreasonable application" prong of Williams v. Taylor, 529 U.S. 362 (2000). Weighall v. Middle, 215 F.3d 1058, 1062 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [United States Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413. The habeas corpus applicant bears the burden to show that the state court applied United States Supreme Court precedent in an objectively unreasonable manner. Price v. Vincent, 538 U.S. 634, 640 (2003).

In his traverse, Petitioner claims that it is unclear whether Petitioner is challenging the

1991 strike as a violation of the Ex Post Facto clause, or whether he is claiming that the underlying sexual misconduct charges relating to the present conviction occurred prior to the enactment of the Three Strikes law, and thus was ineligible for application of the Three Strikes Law. The court rejects this claim, finding that the plain language in Petitioner's petition indicates that he is challenging the propriety of the use of his prior 1991 conviction as a strike in regard to the present case.

The ex post facto clause prohibits a state from enacting a law that imposes additional punishment for a crime than the punishment was when the defendant committed the crime. Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 964 (1981). A law violates the ex post

facto clause under three circumstances: (1) when it punishes a act which was not a crime when it was committed; (2) when it makes a crime's punishment greater than when the crime was committed; or (3) when it deprives a person of a defense available at the time the crime was committed. Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 2719 (1990). A statute enhancing a defendant's sentence because the defendant is a recidivist does not punish the defendant again for the prior offense. Wittie v. United States, 515 U.S. 389, 400, 115 S.Ct. 2199, 2206 (1995). Recidivist statutes have been upheld in the face of ex post facto arguments even if the convictions used to enhance the sentence occurred before the recidivist statute was enacted. See, United States v. Ahumada-Avalos, 875 F.2d 681, 683-84 (9th Cir. 1989) (*per curiam)*

Here, the strike which counsel advised Petitioner could be used against him was a 1991 conviction for felony battery. Although this prior occurred prior to 1994, the use of the convictions under Three Strikes law would not have violated the ex poste facto clause. The Ninth Circuit has held that the use of a pre-1994 strike to enhance a sentence does not violate the ex post facto clause as long as the triggering offense was committed after March 1994, when Three Strikes was enacted. United States v. Sorenson, 914 F.2d 173, 174 (9th Cir.1990); United States v. Ahumada-Avalos, 875 F.2d 681, 683-84 (9th Cir.1984) (*per curiam*). Petitioner was charged with a continuous course of illegal conduct "on or about and between August 19, 1994 and August 19, 1995, which post-dates the enactment of the Three Strikes Law in March of 1994. Thus, the use of the pre-1994 prior to enhance his sentence did not violate the ex poste facto clause. Accordingly, the court finds that Petitioner has failed to carry his burden of demonstrating that the state court's decision on this issue "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Thus, the court concludes that this claim presents no basis for habeas corpus relief.

Evidentiary Hearing in Superior Court

Petitioner contends that the Superior Court should have granted an evidentiary hearing to obtain testimony from his attorney. Petitioner notes, as Respondent acknowledges, that the court's minute order contains a typo stating that the Three Strikes Law went into effect in 1997, rather than 1994. As set forth above, there is no merit to Petitioner's claim that his counsel incorrectly informed him as to the possible application of the Three Strikes Law to him. Thus, Petitioner has failed to carry his burden under the AEDPA and this claim presents no basis for habeas corpus relief.

District Attorney's Duty to Recuse Himself

Petitioner claims that the prosecutor should have recused himself from the case, because a charge of solicitation of murder was pending against Petitioner, and the prosecutor was the alleged object of the solicitation for murder. Petitioner argues that the District Attorney's Office was aware of the conspiracy and placed Petitioner under added pressure to accept the plea bargain. The Stanislaus County Superior Court rejected this claim, finding that Petitioner had not adequately set forth the issue. The Superior Court also found that prior to the plea, Petitioner did not make a motion to recuse the District Attorney.

The facts of this case, as set forth in the Court of Appeal's January 29, 2001 opinion, are as follow. On November 8, 1995, Petitioner pled guilty to engaging in three or more substantial sexual assaults. On December 12, 1995, Detective Heyne of the Stanislaus County Sheriff's Department went to the Public Safety Center to speak to Enoch Boatman, who reportedly had obtained information about Petitioner wanting some witnesses and Deputy District Attorney John Goold killed. This visit took place a day or two after Boatman gave authorities a pink piece of paper that Boatman represented contained the names of several persons Petitioner wanted killed. Boatman said Petitioner first approached him about having these people killed around December 5th. In addition to the witnesses, Petitioner wanted the district attorney, who he thought was handling the case, "taken out."

On December 16, 1996, a jury found Petitioner guilty of four counts of solicitation of murder.

As Respondent argues, this contention simply lacks merit. Under the chronology of events set forth above, the charges in the solicitation case were not pending at the time Petitioner entered his plea, and the District Attorney could not have known about a murder plot against him that had not yet occurred. Accordingly, the District Attorney could not have pressured Petitioner to enter a plea based on the solicitation for murder charges.

In his traverse to Respondent's answer, Petitioner argues that Respondent ignores the fact that he returned to court in mid-November and voiced his desire to file a motion to withdraw his plea. New counsel was appointed and a motion to withdraw was filed. This motion remained pending throughout the time of the investigation into the solicitation of murder charge. Thus, Petitioner argues, the District Attorney was aware of the investigation into the murder plot against Deputy District Attorney Gould at the time Petitioner's motion to withdraw his plea was before the court. Petitioner claims that Goold had a conflict of interest before the hearing on the motion to withdraw the plea. Specifically, Petitioner claims that by mid-December 1995, as the alleged target of a murder plot, Gould had personal reasons for securing Stokely's convictions for two "strikes" - - felony battery and molestation - - under the plea agreement; that would put Stokely in prison for life under the new law if he were convicted of soliciting for murder. Petitioner concludes that under these circumstances, the Stanislaus County District Attorney had a conflict of interest in the sexual molestation case, which required him to recuse himself. He notes that the Attorney General took over the prosecution of the solicitation for murder case, in recognition of the District Attorney's conflict of interest in that case.

The court finds that Petitioner is now attempting to alter his original contention, which is that the District Attorney's awareness of the solicitation for murder put extra pressure on him to accept the plea bargain. As stated above, the chronology of events

negates that contention. Moreover, the court finds that Petitioner has failed to provide the court with any federal authority showing that the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d). That is, Petitioner has not provided any federal law showing that the District Attorney's failure to sua sponte recuse himself from the sexual molestation case during the pendency of the motion to withdraw the plea deprived Petitioner of due process. Although Petitioner quotes language regarding the need for prosecutorial impartiality from Berger v. United States, 295 U.S. 78, 88 (1935), that case is readily distinguishable. Berger involved misconduct on the part of the prosecutor which was "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential" such that a new trial was ordered. Id. No such conduct is alleged in this case.

Accordingly, the court finds that this contention provides no basis for habeas corpus relief.

Based on the foregoing, IT IS HEREBY RECOMMENDED as follows:

1) that the petition for writ of habeas corpus be DENIED;

2) that the Clerk's Office be directed to enter judgment for Respondent and to close this case.

These Findings and Recommendation are submitted to the assigned United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be

captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: October 25, 2007 **/s/ William M. Wunderlich**
UNITED STATES MAGISTRATE JUDGE